



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 18, 2023

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BOARD DECISIONS

Appellant: Nikesha Yvette Williams
Agency: Department of Defense
Decision Number: [2023 MSPB 23](#)
Docket Number: PH-1221-18-0073-W-1
Issuance Date: August 17, 2023
Appeal Type: Individual Right of Action (IRA)

WHISTLEBLOWING JURISDICTION WHISTLEBLOWING PROOF OF CLAIM

The administrative judge found that the appellant exhausted six alleged protected disclosures with the Office of Special Counsel (OSC), she nonfrivolously alleged that two of those disclosures evidenced violations of the Federal Acquisition Regulations, and she nonfrivolously alleged that those two disclosures were a contributing factor in her probationary termination. However, the administrative judge determined that the appellant made her disclosures in the normal course of her duties, and that pursuant to 5 U.S.C. § 2302(f)(2), such disclosures were excluded from protection under 5 U.S.C. § 2302(b)(8) unless she could show that the agency took the action “in reprisal” for her disclosures, which required her

to nonfrivolously allege that the agency terminated her “with an improper retaliatory motive.” The administrative judge concluded that the appellant failed to make such a showing and therefore determined that the Board lacked jurisdiction over her IRA appeal.

Holding: The “extra proof requirement” in 5 U.S.C. § 2302(f)(2) does not limit the Board’s IRA jurisdiction.

1. The administrative judge assumed that the language in section 2302(f)(2) requiring an employee who makes a disclosure in the normal course of duties to “demonstrate[]” that the challenged personnel action was taken “in reprisal for the disclosure” imposed an additional jurisdictional requirement.
2. The legislative history of the Whistleblower Protection Enhancement Act of 2012 (WPEA) makes clear that section 2302(f)(2) imposes an “extra proof requirement” for disclosures made in the normal course of duties.
3. The language in section 2302(f)(2) requiring that an employee “demonstrate[]” reprisal indicates that an employee must prove reprisal by preponderant evidence on the merits. This determination is not part of the jurisdictional analysis in an IRA appeal.

Holding: Because the appellant met her jurisdictional burden, remand is required for a hearing on the merits of her IRA appeal.

1. The administrative judge dismissed the appeal based on the incorrect assumption that the extra proof requirement in section 2302(f)(2) applied at the jurisdictional stage, but otherwise correctly found the appellant met her jurisdictional burden as to two of her disclosures. The Board has jurisdiction over those two disclosures and remand of the appeal for adjudication on the merits is necessary.
2. The administrative judge should make determinations on remand concerning: (1) whether the appellant’s primary job function at the time of her disclosure was to investigate and disclose wrongdoing, and (2) whether the disclosures were made in the normal course of her duties. The administrative judge may consider these questions in the order that is most efficient.
3. If both conditions are satisfied, the administrative judge should determine whether the appellant can meet the “extra proof” requirement in section 2302(f)(2) by demonstrating that the agency terminated her “in reprisal” for her disclosure. If either condition is unsatisfied, section 2302(f)(2) does not apply and the

general standard set forth in section 2302(b)(8) should apply.

4. In determining whether the appellant can meet her additional burden under section 2302(f)(2), the administrative judge should consider the totality of the evidence, including both direct and circumstantial evidence. Circumstantial evidence includes (1) whether the acting agency officials knew of the disclosures and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosures were in reprisal for the personnel action; (2) the strength or weakness of the agency's reasons for taking the personnel action; (3) whether the disclosures were personally directed at the acting officials; (4) whether the acting officials had a desire or motive to retaliate against the appellant; and (5) whether the agency took similar personnel actions against similarly situated employees who had not made disclosures.

COURT DECISIONS

NONPRECEDENTIAL:

Anderson v. Merit Systems Protection Board, [2023-1248](#) (Fed. Cir. August 11, 2023) (DA-0752-13-0106-I-1) (per curiam). The court found that the Board did not abuse its discretion when it dismissed the petition for review challenging the petitioner's removal as untimely filed without good cause shown for the delay. The court acknowledged the personal difficulties the petitioner identified, her pro se status, and her inexperience with Board procedures, but noted that the Board considered those claims in finding that the petitioner failed to show good cause for her over 4-year delay in filing her petition for review.

Jolley v. Department of Housing and Urban Development, [2022-1882](#) (Fed. Cir. August 11, 2023) (AT-3330-17-0060-I-1 & AT-4324-17-0235-I-1) (per curiam). The petitioner challenged the Board's decision affirming the initial decisions denying his requests for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA) and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) based on the agency's failure to select him for a position. The court affirmed the Board's decision, finding that it committed no error in denying the petitioner's VEOA claim because he was not qualified for the position. The court also concluded that the Board did not err in rejecting the petitioner's USERRA claim on the basis that his lack of

qualifications, and not his military service, was the reason or his nonseleciton. Finally, the court determined that the Board properly rejected the petitioner's argument that the AJ acted improperly and that the Board did not abuse its discretion by declining to consider the petitioner's rebuttal evidence.

Anoruo v. Department of Veterans Affairs, [2023-1114](#) (Fed. Cir. August 16, 2023) (SF-1221-22-0181-W-1) (per curiam). The court affirmed the Board's decision denying the petitioner's request for corrective action in his IRA appeal. The petitioner is a clinical pharmacist and he engaged in protected activity by filing a prior complaint with OSC challenging the agency's decision to close clinical pharmacies and certain policies relating to the mail order prescription system. The court deferred to the administrative judge's reasoned credibility findings and her decision not to credit the petitioner's testimony as incredible or inconsistent in finding that the agency would have taken the challenged personnel actions against the appellant even in the absence of his OSC complaint. The court also found no error in the Board's findings that the petitioner was not subjected to a hostile work environment and that the agency established by clear and convincing evidence that similarly situated non-whistleblowers were subjected to the same actions as the petitioner.

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